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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 176

ALICE MASTEN SPENCER, as Administratrix, etc.,
Appellant,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

ALICE MASTEN SPENCER, et al.,
Appellants,

vs.

THE HIBERNIA BANK, a corporation, et al.,
Appellees.

MARIAN MEL, as Special Administratrix of the Estate of John Mel, Deceased,
Appellant,

vs.

THE HIBERNIA BANK, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF RICHARD M. TOBIN, DECEASED, FLORENCE ADELE TOBIN, JOSEPH O. TOBIN, EDWARD J. TOBIN, CYRIL R. TOBIN, CONSTANCE DE YOUNG TOBIN, BEATRICE TOBIN RAOUL-DUVAL, RUTH HAWKINS TOBIN, ABBY PARROTT TOBIN, CELIA TOBIN CLARK, RICHARD RAOUL-DUVAL, THE HIBERNIA BANK AS EXECUTOR OF THE ESTATE OF CHARLES J. BARRY, DECEASED, ERNEST O. McCORMICK, JR., LEO O'GRADY, SHELDON G. COOPER, JOSEPH O. TOBIN, TRUSTEE, CYRIL R. TOBIN, TRUSTEE, RICHARD RAOUL-DUVAL, TRUSTEE, ERNEST O. McCORMICK, JR., TRUSTEE, SHELDON G. COOPER, TRUSTEE, DOES ONE TO FIFTEEN,
Appellees.

APPELLANTS' ANSWER TO APPELLEES' MOTION TO DISMISS

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Table of Authorities Cited

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In citing the opinion of the Court below, we use the paging of the Appendices to our Notice of Appeal and Jurisdictional Statement.

I. CORRECTIONS OF MISSTATEMENTS IN MOTION TO DISMISS

Before discussing appellees' arguments, we correct some misstatements or misleading statements which occur in the Motion to Dimiss.

A. At page 3, note 2 appellees say, *inter alia*, "the case involves no dormant account". The District Court of Appeal, however, considered this as one of the aspects of the litigation.

App'x A, p. 34:

> "The member who did not exercise such right to deposit contributed nothing to the bank. A by-law could reasonably sever a right left *dormant* and unused: . . ." (Italics added.)

B. An erroneous impression may follow from Appellees' statement on p. 10 of their motion, namely that "Appellees called no witness to the stand." *But appellees did offer affidavits.* When *appellants* tried to call one of the affiants to the stand, *appellees objected, and the court did not even allow the witness to be put on the stand.* The question was actually never reached whether appellees' records had to be offered piecemeal or could be offered *en masse*. This appears both from the opinion and the record.

See App'x A, p. 18:

> "Appellants first contend that upon a hearing of a motion for summary judgment an affiant may be called as a witness and questioned as to the basis of his averments in the manner appellants attempted to follow in the instant case."

See R____ in *Spencer v. Hibernia*, No. 19194 DCA (p. 7, line 25 to p. 8, line 15 and p. 14, lines 21-24 of testimony following pleadings and motion papers).

"February 13, 1959

Reporter's Tr. No. 19,194, 7:25-8:15

Mr. Olshausen. Before we start the argument, we want to call Mr. David Barry to the stand with the documents which he has been subpoenaed to bring.

Mr. Lasky. If the court please, on a motion for summary judgment oral testimony is not permissible; the Code section itself is quite clear upon that matter.

The Court. Yes. Do you have any authority to the contrary? It is my understanding that the purpose of a summary judgment is to determine the matter on affidavits.

Mr. Olshausen. . . . We want the record to show wh.. was stated earlier this afternoon, that we subpoenaed Mr. David J. Barry, who made an affidavit here, who is the vice-president and one of the officers of the Hibernia Bank, and he is present under subpoena to bring the records of the Hibernia Bank into the court from the beginning up until the present time. I think it is 18,700 pages which are mentioned in Mr. Tobin's affidavit."

14:21-24:

"The Court. Well, I will certainly grant you that, I think I better cross this particular bridge at this time and the Court will sustain the objection to any testimony by Mr. Barry at this time."

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Besides, the District Court of Appeal's mention of offering records *en masse* does not deal with the availability of cross-examination, but solely with the state-court question whether appellees' objection to evidence was sufficient. See Juris. State., App'x A, pp. 19-20.

C. On p. 10 appellees suggest that the complete denial of cross-recommendation was "smuggled in"—"under California practice a question smuggled into a closing brief merits scant consideration: *Faus v. Pacific Electric Ry. Co.*, 146 C.A. 2d 370, 379, 303 P. 2d 814, 821."

But the question was not "smuggled in"—it was part of Appellants' Reply to Respondents' Supplemental Brief *which was filed by special leave of court*. (The order granting leave to file was signed by Presiding Justice Bray on the face of the original; we specially asked that this order be made part of the record—we have not seen the record as it was sent to the Supreme Court.)

II. OBJECTIONS TO RETROACTIVE OPERATION OF STATUTES OF 1862 AND 1864 WERE TIMELY RAISED; PRESENT SUBSTANTIAL QUESTION; NOT ANSWERED ON AN ADEQUATE STATE GROUND

Appellees argue (pp. 4 ff) (1) that the case does not come within *Missouri v. Gehner*, 281 U.S. 313 or *St. Louis Ry Co. v. Sunburst Oil Co.*, 287 U.S. 358, holding that a constitutional issue is timely if raised upon petition for rehearing where it arises from the nature of the State Court's decision itself; (2) that there is an "adequate state ground because the District Court

of Appeal *construed* the organizational papers of 1859 as not creating any contract or property rights; and (3) that the asserted unconstitutionality of a state statute, not previously before the U.S. Supreme Court, is supposedly "insubstantial". We answer these points in order.

A. Question of Constitutionality of Statutes Timely Raised in Petition for Rehearing

1. Constitutionality under XIVth Amendment Raised by District Court of Appeal Itself

So far as unconstitutionality under the XIVth Amendment is concerned, the District Court of Appeal itself considers this question:

> (App'x A, p. 36) "Appellants in substance contend that the by-laws could not validly sever the right of descendibility and that neither legislative enactment nor by-law provision could remove the member's right of descendibility without violation of due process."

2. Justification Under State Statute Raised for First Time by District Court of Appeal

a. Neither the articles of incorporation of 1859 nor the by-laws of 1859 contained any express provision either that withdrawal of cash balance should forfeit membership, or that membership should be non-descendible. *Subsequent* by-laws provided *both* that membership should be lost by withdrawal of cash balance and that membership should be non-descendible.

If these provisions are taken to be merely *private enactments* they could be construed as being *private*

breaches of contract. But the moment the later by-laws *are held to carry out a state statute*, they become state action, and they stand or fall with the validity of the state statute as thus construed and applied.

Section 4 subd. *Sixth* of Cal. Stats. 1862, p. 199 (see p. 10 of Jurisdictional Statement) contains only the most general language, giving a corporation power—

> "*Sixth*—To make by-laws, not inconsistent with the laws of this State, for . . . the time and manner in which any person may become or may cease to be a member of the corporation . . ."

The California rule of construction is that statutes are ordinarily construed as operating *prospectively*. (*Krause v. Rarity*, 210 Cal. 644, 293 P. 62, 66.)

The District Court of Appeal *for the first time* holds *(and appellees make no contention to the contrary)* that this general language authorizes by-laws cutting off *rights which antedate both the statute and the by-laws*. We recapitulate the statements in the opinion to this effect:

> (App'x A, p. 35) "If Mel and Masten became members of Hibernia of 1864 they were bound by the terms of such membership, which carried with it the authorization to the board of directors *pursuant to the Act of 1862, to pass the by-laws in question*, and these by-laws severed descendibility in view of the decisions in *Bennett and Doyle*." (Italics except case names added.)
>
> (id. p. 36) "As we shall explain, the legislature validly *empowered* the board to fix the composi-

tion of the membership by enacting the Act of 1862 (Stats. 1862, p. 200)." (Court's italics.)

(id. p. 37) "Indeed it (*Bennett v. Hibernia*, ~~49~~ 47 Cal. 2d 540) states the opposite: the right of transferability survives only in the *absence* of such a statute or by-law." (Court's italics.)

(id. pp. 37-8) "The two decisions thus sustain the *legislative power* to give Hibernia the right to determine its composition and *to exercise any claimed right of transferability in members of Hibernia of 1859*. . . . The legislature gave a complete and unlimited right to determine membership." (Italics added.)

In the previous quotation *(supra)* the District Court of Appeal itself had said that *Bennett v. Hibernia,* 47 Cal. 2d 540 held that 'in the *absence of a statute* membership rights in Hibernia of 1859 were transferable. The District Court of Appeal for the first time holds that the general language of Sec. 4, subd. *Sixth* of Cal. Stats. 1862, p. 199 is a statute authorizing the destruction of these preexisting rights.

b. The previous appeal of *Bennett v. Hibernia Bank,* 47 Cal. 2d 540 had first said that (p. 551 ff) the members had property interests in the Hibernia of 1859; (pp. 551-2) that in the absence of a statute or by-laws to the contrary these rights were transferable; (p. 552) that a later by-law terminating membership upon withdrawal of deposit was not binding on members of the 1859 organization if it would unreasonably impair their membership rights. The statute of 1862 (Cal. Stats. 1862, sec. 4, subd.

Sixth) is mentioned only insofar as it authorized *directors* rather than members or stockholders to enact laws. See *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, 551.

> "The power to adopt by-laws is ordinarily in the stockholders or members of the corporation, but directors may be given such authority by statute or articles of incorporation. . . . The 1862 act provided that the 'corporate powers of the corporation shall be exercised by a Board of not less than five Directors;' and it contained a list of corporate powers, one of which was to 'make by-laws, not inconsistent with the laws of this State,' for certain enumerated purposes. (Stats. 1862, p. 200.) Under the 1862 act, one of the purposes for which the corporation, and hence the directors, could make by-laws was to regulate 'the time and manner in which any person may become, or may cease to be, a member of the corporation.' (Stats. 1862, p. 200.) This language was broad enough to permit the directors to adopt by-laws specifying the conditions under which membership rights might be acquired or lost."

Bennett v. Hibernia Bank, 47 Cal. 2d ~~150~~ 540, was a decision of the California Supreme Court, and a decision on the previous appeal of the companion case to the cases at bar. (*Doyle v. Hibernia,* 156 Cal. App. 2d 16, was concerned with a membership originating in 1889, and had nothing to do with the question of retroactivity. See App'x A, p. 43.) So far as the Supreme Court decision of *Bennett v. Hibernia* goes, it is the direct opposite to holding that the general language of Cal. Stats. 1862, p. 199, sec. 4 authorized by-laws cut-

ting off pre-existing rights. As stated above, this idea is injected for the first time by the District Court of Appeal itself. It was therefore timely to raise the constitutional objections to the statute thus construed and applied, on Petition for Rehearing. *Missouri ex rel. v. Gehner*, 281 U.S. 313, 320; *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 367.

3. Motion to Dismiss Does Not Dispute That District Court of Appeal Actually Ruled on Constitutional Question Raised on Petition for Rehearing

We made the point (jurisdictional Statement p. 18) that the District Court of Appeal actually ruled on the claimed violation of constitutional rights by a retroactive statute. In denying the Petition for Rehearing it *modified its opinion so as to hold in effect that there supposedly was no retroactivity. Appellees nowhere mention this point in their motion to dismiss.*

In case our jurisdictional statement was not sufficiently clear we quote the passages which show exactly what the District Court of Appeal did in denying rehearing. In its original opinion it had said—

> (App'x A, p. 44) "Since the drafting of by-laws necessarily followed the filing of articles, the corporation in the very process of formation would inevitably be saddled with rights of members which the by-laws could not retroactively impair."

In its modification of opinion on denial of rehearing (App'x B) the District Court of Appeal inserted the phrase "upon appellants' hypothesis" after the word "formation" in the above sentence, and put quotation

marks around the word "retroactively" so that the sentence finally reads—

> "Since the drafting of the by-laws necessarily followed the filing of the articles, the corporation in the very process of formation *upon appellants' hypothesis,* would inevitably be saddled with rights of members which the by-laws could not '*retroactively*' impair". (Italics added.)

Here the court affirms that rights of members are being impaired; but by putting quotation marks around the word "retroactively" it clearly intends to deny that there actually is any retroactivity. Thus it admits impairment of membership rights but seeks to deny the claim of impairment-of-obligation-of-contracts by denying retroactivity. It rules on the constitutional claim under Art. I, sec. 10 (contracts clause) by denying retroactivity. Since the state Court actually ruled on the constitutional question raised on Petition for Rehearing, the question was timely raised. *Gt. No. Ry. Co. v. Sunburst Oil & Ref. Co.,* 287 U.S. 358, 367.

B. No Adequate State Ground of Decision

Appellees claim there was an "adequate state ground of decision" because the District Court of Appeal *construed* the certificate of incorporation and by-laws of 1859 as granting neither property rights in the assets of the corporation nor any transferable rights. *Long Sault Dev. Co. v. Call,* 242 U.S. 272, 277, is cited (motion to dismiss p. 7).

There are three answers to this. *First,* when a subsequent statute is attacked as impairing the obligation

of contracts, the state Court's *construction* of the contract—whether it gives constitutionally protected rights—is part of the federal question. Otherwise a state could always circumvent the contracts clause of the constitution by "construing" a contract as not granting any rights, even in the face of earlier decisions to the contrary—as was actually done in the cases at bar (see below). *Long Sault Dev. Co. v. Call*, 242 U. S. 272, did not involve construction, as we show *infra*.

Second, a large part of the holding of the District Court of Appeal is not whether the 1859 documents granted any rights at all, but whether the rights which were granted are *sufficiently substantial to be constitutionally protected*. This, of course, is a federal question.

Third, In view of the bizarre history of this litigation (which we set forth more fully below) nothing said by the District Court of Appeal in its present opinion, can be held to furnish an "*adequate*" state ground of decision.

1. Construction of Contract Federal Question

Long Sault Development Co. v. Call, 242 U.S. 272 did not involve *construction* of the contract which was claimed to be impaired. The "contract" was a state statute (242 U.S. 272, 273, 274-5). The state court held this statute unconstitutional under the state constitution *as it existed when the act was passed*. 242 U.S. 272, 278-9.

Previous to its holding, the Court, by way of *dictum* had treated the *construction* of the contract as a federal question:

> (pp. 276-7) "The grants of the Act of 1907 are such that, if it was a valid law, upon their being accepted, *they constituted property or contract rights,* of which the plaintiff could not be deprived, and which could not be impaired by subsequent legislation . . ." (Italics added.)

The District Court of Appeal does not hold the documents of 1859 to be void as in conflict with any contemporaneous state law. Instead, it *construes* them as (1) not granting property or contract rights (2) not granting membership which survives withdrawal of cash deposit (3) not granting rights which survive transfer. We cite the pages of Appendix A to the Jurisdictional Statement—pp. 22, 23, 26, 31, 45-48; Appendix C, p. 64.

But *construction* of the contract claimed to be impaired, was not only recognized by *dictum* as part of the federal question in the *Long Sault* case, 242 U.S. 272, but was so held in *La. Ry. & Nav. Co. v. Behrman,* 235 U.S. 164, cited on p. 19 of our Jurisdictional Statement. This Court there said,

> (pp. 169-70) "the judgment was affirmed by the supreme court of the state upon the ground that the contract was 'subject to a suspensive condition, and that this condition has become impossible of realization, and the contract had, in consequence, fallen through, when plaintiff made its attempt to begin work and the injunction was taken' ".

Here the state Court *interpreted* the contract as being ineffectual.

The Supreme Court answered this by saying,

(p. 170) "The defendant in error moves to dismiss, invoking the established rule that where the state court gives no effect to the subsequent enactment, the jurisdiction of this court does not attach (cases). We are of the opinion that the present case is not within this rule. It is equally well settled that where the state court does give effect to later legislation which operates to impair the obligation of a contract *if one exists*, this court is not deprived of jurisdiction because the *state court has put its decision upon the ground that the contract was not made*, or that it was invalid, or that it has become inoperative. *In such a case, this court must determine for itself whether there is an existing contract.* Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, *and this court might be of the opinion that there was a valid contract*, which thereby would be impaired, it would be powerless to enforce the constitutional guaranty (cases)."

(p. 171) "And in determining whether effect has been given to the later statute, this court is not limited to the mere consideration of the opinion of the state court. (cases) In the present case it is apparent that the whole object of the suit was to establish the right of the city to carry out the subsequent ordinance, . . . It must follow that this court has jurisdiction to determine whether that claim is well-founded; that is *whether there is a contractual obligation* which the plaintiff in

> error is entitled to enforce without its being impaired by the operation of the subsequent provision having, by virtue of state authority, the force of state law." (Italics added.)

In the present case the motions for summary judgment were based *entirely* on the later by-laws, which the District Court of Appeal upholds because "the Legislature gave complete and unlimited right to determine membership." (Jurisdictional Statement, App'x A, p. 38.) Moreover the bases on which the District Court of Appeal finally decided the case correspond exactly with the subsequent by-laws (Jurisdictional Statement, App'x A, p. 52): ". . . appellants' case neither surmounts the discontinuation of their predecessors' depositorship in Hibernia nor their deaths of more than a half century ago."

Finally, the District Court of Appeal's construction of the documents of 1859 is the *direct opposite* from that made by the California Supreme Court of the *same documents* in the prior appeal of the companion case, *Bennett v. Hibernia Bank*, 47 Cal. 2d 540. The *construction* of the 1859 documents has not even been uniform, with the construction by the state Supreme Court in favor of the contractual obligation. (We examine this point in greater detail below, in arguing that the opinion of the District Court of Appeal does not in any event furnish an *adequate* state ground of decision.) The *subsequent* by-laws are what the motions for summary judgment invoked, and the only unequivocal holding made by the District Court of Appeal.

2. Substantiality of Contractual Right Claimed Is Federal Question

To a large extent the District Court of Appeal does not hold that there is *no* contractual right, but merely that the rights are too "insubstantial" to receive constitutional protection. See Jurisdictional Statement, App'x A, pp. 33-4, 50-51. The question whether a right is *sufficiently substantial to receive constitutional protection* is clearly a federal question.

3. Statements of District Court of Appeal Do Not in Any Event Furnish "Adequate" State Ground of Decision

The bizarre history of this litigation is that on both of the two substantive points (survival of membership after withdrawal of deposit; transferability of membership) the District Court of Appeal holds directly contrary to the language of the Supreme Court of California in *Bennett v. Hibernia Bank,* 47 Cal. 2d 540, but yet the Supreme Court denied a Petition for Hearing, with Justice Peters dissenting. (Justice Peters was on the District Court of Appeal at the time of the first appeal of the *Bennett* case, and wrote an opinion reaching the same result as that ultimately reached by the Supreme Court in *Bennett v. Hibernia,* 47 Cal. 2d 540. Justice Peters' opinion may be found in 289 P. 2d 57.)

Thus the Supreme Court said (1) that the 1859 members had property rights (2) which are transferable; and (3) that by-laws forfeiting membership on withdrawal of deposits are inapplicable to a member of 1859 if they unreasonably deprive him of membership rights. The District Court of Appeal holds *contra* all three points (1) that members in the 1859

corporation had no property rights and (2) what rights they had were not transferable (3) that membership did not survive withdrawal of deposits.

a. We quoted part of the language of the California Supreme Court on page 21 of the Jurisdictional Statement. The following language shows the State Supreme Court's position on both of the first two points:

> (47 Cal. 2d 540, 551-2) "Hibernia was organized as a business and profit organization, and the members had property rights in the assets of the corporation. In the absence of a statute, by-laws or other regulation to the contrary these rights were transferable."
>
> (47 Cal. 2d 540, 552) "A by-law adopted in 1868 provides in part: 'No one shall be deemed a member whose account is once closed.' Since this by-law was adopted after Curtin became a member it would not be enforceable against him, in the absence of his consent, if it would unreasonably deprive him of his membership rights."

Whether such a by-law would "unreasonably deprive him of his membership rights" is a question which could arise only if membership survived the closing of the account, before the by-law was passed.

b. The District Court of Appeal first states that the Supreme Court recognized a right of transferability:

> (App'x A to Juris. State. p. 37) "Indeed it [the State Supreme Court] states the opposite; *the right of transferability* survives only in the ab-

> sence of such a statute or by-law" (Italics added; Court's italics omitted)

—and then proceeds to hold the opposite from the Supreme Court on all three points:

(1) It holds that the members of 1859 had no property rights (App'x C to Jurisdictional Statement, p. 64, quoted Jurisdictional Statement pp. 21-2);

(2) The District Court of Appeal holds that membership was not transferable (App'x A to Jurisdictional Statement, pp. 45-48);

(3) The District Court of Appeal held that membership does not survive the withdrawal of a deposit (App'x A to Juris. State. pp. 21-31).

In California, the Supreme Court's denial of a hearing after decision by the District Court of Appeal does not constitute an approval of the decision on the merits. *People v. Rabe,* 202 Cal. 409, 418-19; *Bohn v. Bohn,* 164 Cal. 532, 537-8; *People v. Davis,* 147 Cal. 346, 350.

If the opinion of the District Court could be called an overruling decision, it would raise new problems. (Cf. *Gelpcke v. Dubuque,* 68 U.S. 175, 206 cited in Juris. State. p. 22.) If, as we believe, it is *not* an overruling decision, then we submit, it furnishes no *adequate* state ground of decision insofar as it contradicts the California Supreme Court in *Bennett v. Hibernia,* 47 Cal. 2d 540. (We have found no precedent for this situation.)

C. Answer to Other Contentions on Substantiality

On p. 8 of the Motion to Dismiss, appellees try to brush aside the XIVth Amendment on the ground that it was not adopted until 1868, but insofar as the Acts of 1862 and 1864 are *treated as operative after 1868* they would have to meet the test of the XIVth Amendment (the Civil War Amendments were clearly intended to nullify pre-existing legislation which did not conform to them—e.g., the XIIIth Amendment with respect to pre-existing slave laws).

On pp. 9-10 of the Motion to Dismiss, appellees quote the language (Juris. State. App'x A, p. 20) that "appellants themselves assert the 1864 incorporation was undertaken pursuant to the members' authorization and certain acts of the Legislature". This language relates to the *first count of* the amended complaint (claiming a partnership) which is *not the subject of this appeal.* The District Court of Appeal nowhere claims that Masten and Mel as members of the 1859 organization *consented* to the destruction of their memberships. On the contrary, it holds that such destruction was authorized by *statute.* (Juris. State. App'x A, p. 38, quoted above.)

The remainder of pages 8 and 9 of the Motion we have already answered.

III. DENIAL OF DUE PROCESS THROUGH DENIAL OF CROSS-EXAMINATION UNDER CAL. CCP 437c (Motion to Dismiss pp. 10-12)

We have already answered appellees' preliminary contention, *supra*, pp. 2-4.

A. Objection to Denial of Cross-Examination Timely Raised

1. We have already shown that the constitutional objection to total denial of cross-examination was not "smuggled in" but included in a brief filed by special leave of Court. *Supra*, p. 4.

2. Appellees' claim that the point cannot be raised because it was not *repeated* in the Petition for Hearing by the Supreme Court. They cite *Missouri v. Gehner*, 281 U.S. 313, 320 for the proposition that the constitutional issue must be raised before the "highest" state Court. But *Missouri v. Gehner* came up from the Supreme Court of Missouri so the question now raised was not involved. Here the District Court of Appeal *was* the "highest state court", the California Supreme Court having denied a hearing. This has always been the holding with respect to cases coming up from California. *Stromberg v. California*, 283 U.S. 359, *sub nom. People v. Mintz*, 106 Cal. App. 725, 290 P. 93; *I.A.M. v. Gonzales*, 356 U.S. 617, *sub nom. Gonzales v. I.A.M.*, 142 Cal. App. 2d 207.

We submit that the phrase "the highest state court" does not mean two different things. It is the same Court whether for purposes of determining from which Court an appeal is taken (28 U.S.C. 1257)

or for determining where the constitutional question must be raised. Here it was the California District Court of Appeal.

3. On page 4 of the Motion, appellees claim that we did not designate a statute sufficiently to sustain an appeal—citing *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185. (As to the substantive statutes, this was the entire burden of our Petition for Rehearing.) The reference to denial of due process under the XIVth amendment, on p. 13 of Appellants' Reply to Respondents' Supplemental Brief (Juris. State. p. 17) followed a discussion which *dealt entirely with the operation of Cal. CP 437c*. The claim of unconstitutionality was made unmistakably with reference to this Code section. But if the reference should be thought not sufficiently definite, then the point would be ground for granting *certiorari*, under appellees' own citation of *Charleston Ass'n v. Alderson*, 324 U.S. 182, 185.

B. No Adequate Non-Federal Ground (Motion to Dismiss p. 11)

Appellees claim that the District Court of Appeal held one stated purpose of cross-examination irrelevant and that therefore a total denial of cross-examination *ab initio* raises no separate federal question. But *Alford v. U.S.*, 282 U.S. 687, 694 holds that cutting off all cross-examination *in limine* makes a basically unfair trial regardless of any stated purpose of the cross examination. As we showed in our Jurisdictional Statement (pp. 20-21) denial of the basic elements of fairness is denial of due process.

C. Federal Question Is Substantial (Motion to Dismiss pp. 11-12)

Appellees claim that total denial of *cross-examination* raises no substantial federal question because *discovery procedure* (including depositions) was open to appellants. Appellees cite the California discovery sections (Cal. CCP 2016-2035) which, significantly, the District Court of Appeal does *not* cite. In other words not even the District Court of Appeal suggests that discovery procedure may dispense entirely with opportunity for cross-examination.

Cross-examination comes into play *after* the opponent has given direct evidence. On a motion for summary judgment the direct evidence is the moving party's affidavits. Discovery-depositions could be a substitute for cross-examination only if they were available in the short period between the noticing of the motion for summary judgment (with affidavits) and the hearing on it. Neither the District Court of Appeal nor appellees themselves suggest that this is possible. It is clearly not contemplated as general procedure, since the basic notice is 10 days for both proceedings. See Cal. Code Civ. Proc. 437c, quoted in Jurisdictional Statement; and Code Civ. Proc. 2019, quoted in part as it read on Feb. 13, 1959, in Appendix "A" to this reply. (Any period less than 10 days is made exceptional under CCP 2019 and, at the time of these motions, itself required a motion.) The problem is resolved by the District Court of Appeal's holding that Cal. CCP 437c permits *no* cross-examination. (See below.)

Moreover, *Alford v. U.S.*, 282 U.S. 687 itself shows that discovery is no substitute for cross-examination.

There *the defendant's counsel had made discovery.* They knew that a prosecution witness was in custody of the federal authorities. (282 U.S. 687, 690.) But the fact that the defense had this information, did not prevent the total denial of cross-examination from making an essentially unfair trial.

Hurwitz v. North, 271 U.S. 40, 42; *Iowa Cent. Ry. v. Iowa.* 160 U.S. 389 merely hold that no denial of due process arises from a requirement that witnesses must be examined on deposition rather than in open court. They do not deal with total denial of cross-examination *in any form.* That, however, is what the District says is what Cal. CCP 437c provides. (Juris. Statement, App'x "A", p. 19, the italics on "without" are the Court's.)

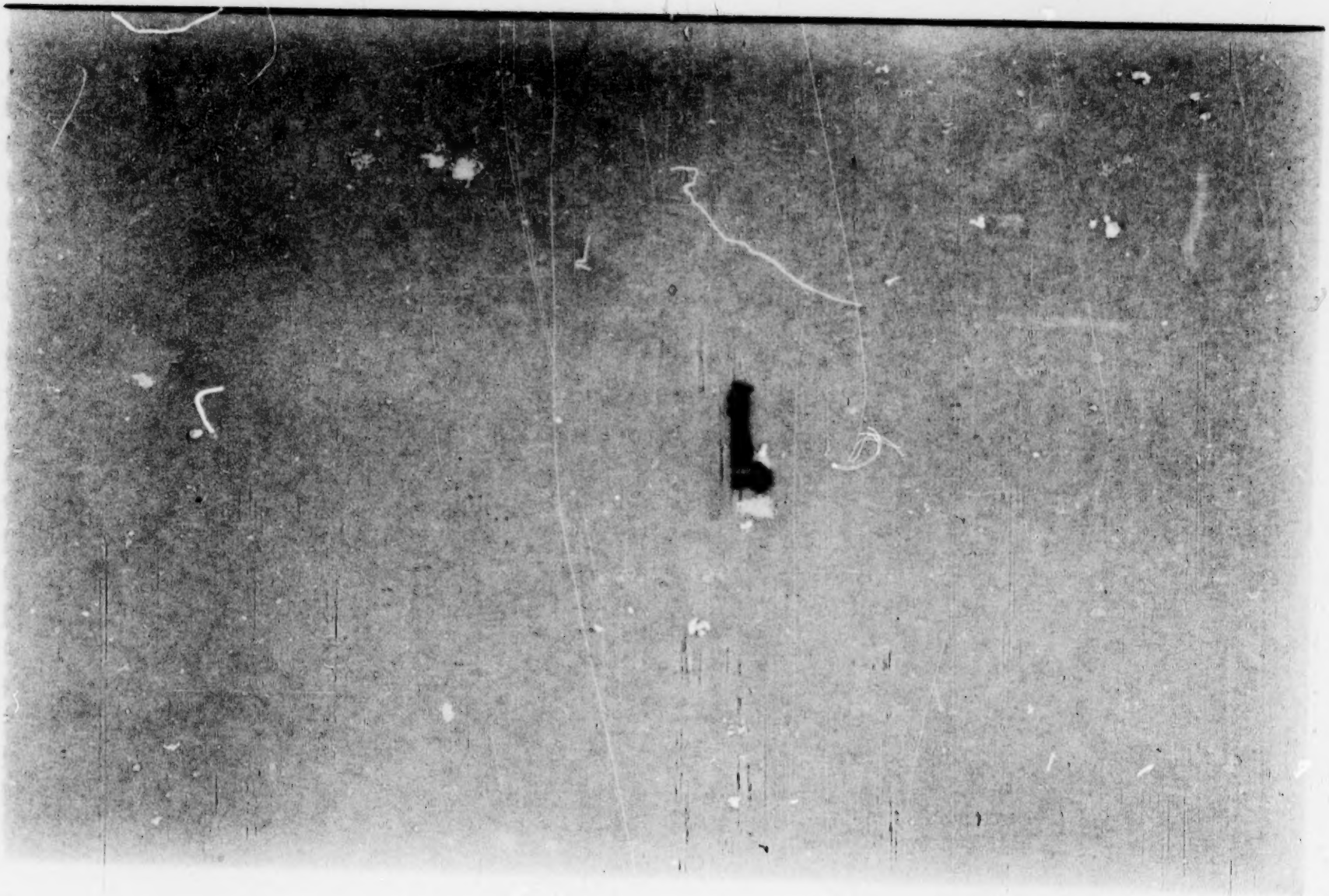
CONCLUSION

It is submitted that the motion to Dismiss the Appeal should be denied: and Probable Jurisdiction noted.

Dated, San Francisco, California,
August 17, 1961.

Respectfully submitted,
M. MITCHELL BOURQUIN,
GEORGE OLSHAUSEN,
Attorneys for Appellants.

(Appendix "A" Follows)



Appendix "A"

Cal. Code Civ. Proc. 2019 (as it read in Feb. 1959)

"*Matter of Taking Oral Depositions*

(a) (1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, ... Such notice must be at least 10 days, adding also one day for every 100 miles of the distance of the place of examination from the residence of the person to whom notice is given, except that on motion of any party upon whom the notice is served the court may for cause shown enlarge or shorten the time. . . ."